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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SANTOSH BHARDWAJ,

4 Plaintiff,

New York, N.Y.

5 v.

11 Civ. 4170 (AKH)

6 PRABHU DAYAL, *et al.*,

7 Defendants.

8 -----x

9 May 31, 2012
10 2:30 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge

14 APPEARANCES

15 THE LEGAL AID SOCIETY

Attorneys for Plaintiff

16 BY: KAREN CACACE

HOLLIS PFITSCH

17 OUTTEN & GOLDEN, LLP

Attorneys for Plaintiff

18 BY: ADAM T. KLEIN

19 ROBINSON BROG

Attorneys for Defendants

20 BY: DAVID C. BURGER

21 CAHILL GORDON & REINDEL, LLP

Attorneys for Counterclaim Defendants The Legal Aid
22 Society and Hollis Pfitsch

23 BY: FLOYD ABRAMS

DAVID G. JANUSZEWSKI

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(In open court)

THE DEPUTY CLERK: Bhardwaj v. Dayal.

Counsel, please state your name for the record.

Counsel.

MR. ABRAMS: FLoyd Abrams for counterclaim defendants
Legal Aid Society and Hollis Pfitsch.

MR. JANUSZEWSKI: David Januszewski, from Cahill
Gordon, also for the same parties.

THE COURT: Why don't you give the introductions for
the whole group. You do the next two.

MS. CACACE: I will do the rest, your Honor. Karen
Cacace and Hollis Pfitsch from the Legal Aid Society for the
plaintiff, and Adam Klein.

THE COURT: I know three of the people in the first
row. Mr. Abrams and I have been friends for a long time,
though we have not entertained each other in any other than a
professional way. Mr. Januszewski is a noted and illustrious
and victorious litigator in my court. I even found out how to
pronounce his name after a long time.

MR. JANUSZEWSKI: Thank you, your Honor.

THE COURT: And Mr. Klein I have known on the
Ansoumana case, which was litigated a couple of years ago, and
I think another case as well.

MR. BURGER: And David Burger, of Robinson Brog, for
the counterclaim plaintiffs.

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1 THE COURT: OK. I would like to first discuss the
2 motion by Akansha Dayal to dismiss the complaint.

3 So, Mr. Burger, I have looked at the complaints and I
4 don't find a specific allegation against Ms. Akansha Dayal, the
5 daughter of Prabhu and Chandini Dayal. Isn't that fatal?

6 MR. BURGER: I believe so, your Honor.

7 THE COURT: You would like to have the motion
8 dismissed, right? You would like to have the complaint against
9 her dismissed.

10 MR. BURGER: Yes, absolutely.

11 THE COURT: So who is going to argue that point?

12 MS. PFITSCH: I am, your Honor.

13 THE COURT: Yes.

14 MS. PFITSCH: So actually, your Honor, in paragraphs
15 45 and 46 we have alleged that all three defendants -- so both
16 Prabhu Dayal, Chandini Dayal, and Akansha Dayal -- have the
17 power to supervise Ms. Bhardwaj.

18 THE COURT: Where is this?

19 MS. PFITSCH: Paragraph 45.

20 THE COURT: How old is she? How old is she,
21 Mr. Burger?

22 MR. BURGER: Pardon?

23 THE COURT: How old is she?

24 MR. BURGER: She is in her 20s.

25 THE COURT: Thanks.

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1 Go ahead.

2 MS. PFITSCH: Again in paragraph 46 we allege that all
3 three defendants have the power to control Ms. Bhardwaj's
4 conditions.

5 THE COURT: I need to look at the first amendment in
6 the complaint.

7 MS. PFITSCH: I'm sorry. It is 46 and 47. It looks
8 like I am --

9 THE COURT: At all relevant times in this action, all
10 defendants had the power to supervise Ms. Bhardwaj. At all
11 relevant times to this action all defendants had the power to
12 control Ms. Bhardwaj's work conditions in the house. So those
13 are not sufficient. Those are not sufficient to bring in a
14 defendant to the kinds of allegations that you have made.

15 MS. PFITSCH: I believe it is, your Honor.

16 THE COURT: It is not.

17 MS. PFITSCH: Can I also just point out, the previous
18 paragraphs are specific to Mr. Prabhu Dayal and Ms. Chandini
19 Dayal.

20 THE COURT: I am not talking about them. I am talking
21 about Akansha.

22 MS. PFITSCH: So then in paragraphs 46 and 47 it
23 includes all three. We didn't repeat their names again in each
24 of those paragraphs, but they are specific to her.

25 Under the broad standards of the employment law, power

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1 to supervise and power to control conditions are sufficient to
2 be an employer.

3 THE COURT: I won't let you do it with a conclusory
4 allegation like that. You bring her in to rather serious.
5 Allegations. So let me ask you. So paragraph 68 alleges a
6 claim under the William Wilberforce Trafficking Victims
7 Protection Reauthorization Act of 2008. Does it make any
8 difference to Akansha if the employee was from India or from
9 New York? She was the daughter. She is getting the benefit of
10 what her parents provide in the house. Why is she sued? Did
11 she have anything to do with procuring Ms. Bhardwaj? Did she
12 have anything to do with bringing her over here? Did she have
13 anything to do with paying her? Did she have anything to do
14 with negotiating the terms of the contract, or any of that?

15 MS. PFITSCH: Your Honor, under the anti-trafficking
16 laws --

17 THE COURT: Answer the question, please.

18 MS. PFITSCH: We have not alleged specifically and it
19 is not within Ms. Bhardwaj's knowledge whether she had anything
20 to do with setting the actual pay that was agreed upon before
21 she came here. That would be something we would seek in
22 discovery.

23 Under the trafficking law, the statute, the standard
24 is whether the person knew or should have known about the
25 actions taken to procure the person's labor.

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1 THE COURT: What do you know about that?

2 MS. PFITSCH: We knew that and allege that she knew
3 about the terms of Ms. Bhardwaj's recruitment.

4 THE COURT: How do you know that?

5 MS. PFITSCH: She lived in the household, your Honor.

6 THE COURT: So what?

7 MS. PFITSCH: She acknowledges in her affidavit,
8 included in the defendants' summary judgment motion, that she
9 knew about Ms. Bhardwaj's work at her parents' house.

10 THE COURT: She knew that she worked. She knew she
11 cleaned, she knew she occasionally made dinners. Essentially
12 she is out of the house. She is a 22 year old.

13 MS. PFITSCH: Your Honor, she knew or the standard
14 also includes should have known about the system under which
15 the defendants brought the plaintiff.

16 THE COURT: Before my kids flew the coop into
17 apartments of their own, do you think they knew what kinds of
18 pay I was paying the household help or my wife was paying the
19 household help or whether it was my wife or me who was paying
20 the household help?

21 MS. PFITSCH: I think that is a very distinct
22 situation. Ms. Dayal is an adult professional.

23 THE COURT: She is 22 years old.

24 MS. PFITSCH: I am not sure that she is 22, your
25 Honor.

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1 THE COURT: How old do you think she is?

2 MS. PFITSCH: She works for Ernst & Young and has for
3 a number of years.

4 THE COURT: So 26 years old.

5 MS. PFITSCH: She is now working in London.

6 She is a professional. She lived in the household.
7 The trafficking law includes both benefiting from the scheme
8 and if you should have known of the situation --

9 THE COURT: Benefiting from the fact that the person
10 is being brought here against her will and kept here against
11 her will and I'm sure to Ms. Akansha Dayal there is nothing
12 more alleged. It didn't make any difference who was cleaning
13 her room or who was feeding her food or whether it was someone
14 who was hired from the United States or hired from abroad.

15 There is no allegation. It doesn't make a whit of
16 difference.

17 MS. PFITSCH: The standards under both the employment
18 law and the trafficking law tend to sweep in people who
19 benefited from it, knew about the work and had the power to
20 stop it. She should have been aware of those conditions.

21 THE COURT: Why should she have been aware? What
22 difference did it make in her life who it was that was cleaning
23 her room?

24 MS. PFITSCH: Again, she is benefiting from this work.

25 THE COURT: In the course your lawsuit it matters not

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1 a bit whether she is involved or not. If she is in the
2 lawsuit, she gets visited with the sins of her parents. It is
3 not fair. You were 22 at one time or 26 at one time. Maybe
4 you still are. I don't know.

5 Is there any allegation that she was involved?

6 MS. PFITSCH: I believe it is fair, your Honor.

7 THE COURT: Mr. Klein was involved when I held in in
8 Ansoumana that that was a coordinate kind of employment
9 situation, but this is not that case.

10 MS. PFITSCH: Your Honor, it is a much more
11 micro-level. It is a household and the adults in the household
12 who benefit and know of the work have the power to stop it.
13 She has included in her affidavit that she gave prohibition on
14 Ms. Bhardwaj's working for her.

15 THE COURT: Prohibition, what does that mean?

16 MS. PFITSCH: In her affidavit she outlines that
17 Ms. Bhardwaj should not do any work for her. The Second
18 Circuit has ruled --

19 THE COURT: What do you mean she should not do any
20 work?

21 MS. PFITSCH: I am not sure exactly what she meant,
22 but that in her affidavit she states that she declared that
23 Ms. Bhardwaj should not do any work for her. It wasn't clear
24 to whom she made that declaration. That kind of prohibition on
25 someone working for you is not enough to avoid liability under

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1 the Fair Labor Standards Act.

2 THE COURT: First you have to have it before you can
3 avoid it.

4 I grant the motion. You don't have any specific
5 allegations with respect to Ms. Akansha Dayal. It is unfair to
6 sweep her in with the allegations made against her parents.
7 There is no allegation she was involved in any way in the
8 hiring or retention or the terms of employment or anything that
9 you allege that was done to the plaintiff Ms. Bhardwaj. That
10 motion is granted.

11 MS. PFITSCH: If we could have leave to amend, your
12 Honor, and replead.

13 THE COURT: What do you know to amend? Do you have
14 anything?

15 MS. PFITSCH: The kinds of things that are included in
16 Ms. Bhardwaj's affidavit.

17 THE COURT: I am not going to grant you leave to amend
18 because at the end of this I am going to give you 60 days to
19 make discovery. This case was filed in 2011, somewhere in the
20 first third of the year judging from the number. It's hung
21 around long enough in the pleading stage. You are going to
22 discover and finish this thing in 60 days.

23 MS. PFITSCH: We would --

24 THE COURT: I am not giving you leave.

25 MS. PFITSCH: Thank you, your Honor.

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1 THE COURT: Now let's go to Mr. Burger.

2 How do you find malice on the claims that were alleged
3 against Mr. Prabhu Dayal and Ms. Chandini Dayal?

4 MR. BURGER: I find malice --

5 THE COURT: These were allegations made for a
6 recovery. The plaintiff wanted a recovery. The plaintiff has
7 a complete privilege to make whatever allegations are necessary
8 to state a cause of action. The plaintiff has stated a cause
9 of action. Merely because the Daily News prints something that
10 it finds in the court files doesn't mean that you have a libel
11 action.

12 MR. BURGER: Your Honor, allegations were included in
13 the original complaint that were withdrawn before any
14 responsive pleading or answer or motion was filed.

15 THE COURT: They were of an evidentiary nature. They
16 had nothing to do with the materiality of the cause of action
17 and they have nothing to do with the essential allegations that
18 you are complaining about, and that is the virtual imprisonment
19 that is alleged against Ms. Bhardwaj.

20 MR. BURGER: Your Honor, there were seven
21 paragraphs --

22 THE COURT: I read them.

23 MR. BURGER: -- dealing with sexual harassment.

24 THE COURT: I read. There was a desire on the part of
25 Prabhu Dayal that Ms. Bhardwaj should massage his tired legs.

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1 That is what you alleged that was withdrawn. It is unnecessary
2 for the gravamen of the cause of action. It doesn't have to be
3 proven. It is withdrawn. It has nothing to do with the Daily
4 News article.

5 MR. BURGER: Your Honor, there is a claim for forced
6 labor which is a criminal offense. There are no allegations to
7 support that. None.

8 THE COURT: Yes, there are. There are allegations
9 that she was not allowed to leave, that she was kept inside the
10 house, that her passport was taken away. That is enough.

11 MR. BURGER: That is not for forced labor.

12 THE COURT: That is so. She was made to work inside
13 the house for long hours. I don't know if it is true or not
14 but I am accepting the allegations as true as I have to.

15 MR. BURGER: There are allegations that the passport
16 was unlawfully withheld.

17 THE COURT: That is right.

18 MR. BURGER: That is false.

19 THE COURT: Why is it false? They allege it. You
20 deny it. How do I know it is false?

21 MR. BURGER: Because they rely on a statute that says
22 it is unlawful to prevent or restrict without lawful authority
23 the person's liberty to move or travel.

24 THE COURT: What is the authority of your client to
25 keep hold of her passport?

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1 MR. BURGER: Pardon?

2 THE COURT: What is the authority of your client to
3 take away her passport?

4 MR. BURGER: The authority issued by his government
5 which issued the official passport which stated that it could
6 only be used for official travel.

7 THE COURT: Notwithstanding, what is your right to
8 take away her passport? Are you her policeman?

9 MR. BURGER: The --

10 THE COURT: Are you her policeman?

11 MR. BURGER: The Consul General is the policeman for
12 the government of India.

13 THE COURT: She is working in the United States of
14 America and you do not have sovereign immunity. If she is owed
15 a wage under our laws, you have got to pay it. If she has a
16 right to travel, you have to let her travel. You can't keep
17 her locked up. That is the allegation. I have to accept it.

18 MR. BURGER: The United States government cannot
19 declare what an Indian passport can be used for.

20 THE COURT: The motion to dismiss the counterclaims is
21 granted. There is no allegation that these, and none could be
22 made, that these allegations could not be made to sustain a
23 cause of action in the nature of that which is alleged. The
24 allegation is the passport was taken away, that she was forced
25 to work hours without getting fair pay, and that she had no

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1 elective to leave, and that is sufficient to state the cause of
2 action. The cause of action is stated properly. There is a
3 privilege to state it. It is not defamation. The Daily News
4 picks up a story from the files of this court and publishes it
5 is not a matter of defamation.

6 MR. BURGER: That is not this case because there were
7 communications to the press, repeated communications.

8 THE COURT: They are not alleged and --

9 MR. BURGER: It is alleged.

10 THE COURT: -- and there is no allegation --

11 MR. BURGER: There are many allegations quoting
12 newspaper reports stating that the counterclaim defendant spoke
13 with the press and made false statements, including statements
14 about illegally withholding the passport, which isn't true when
15 the passport is governed by Indian law.

16 THE COURT: Take me through them.

17 MR. BURGER: Pardon?

18 THE COURT: Take me through the allegations. Show me.

19 MR. BURGER: If you turn to the second amended answer
20 and first amended counterclaims.

21 THE COURT: Yes. What paragraph?

22 MR. BURGER: Paragraph 169. Hollis Pfitsch said: It
23 is expressly illegal for any employer to take a worker's
24 passport. That is not true as to an official passport issued
25 by the Indian government solely and exclusively for travel

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1 related to her official capacity.

2 THE COURT: It is Ms. Hollis Pfitsch's opinion. He or
3 she is free to express it. That is the allegation in the
4 complaint. If you are right, then you may be able to dismiss
5 the cause of action.

6 MR. BURGER: This was in the --

7 THE COURT: Mr. Burger.

8 MR. BURGER: This was in the Economic Times.

9 THE COURT: Mr. Burger, I make the rulings. You make
10 the arguments. Right?

11 MR. BURGER: I am trying to, your Honor.

12 THE COURT: My ruling is that this is a matter of
13 privilege. This is the opinion of Hollis Pfitsch. This
14 parrots the allegations in the complaint. It is a privileged
15 statement.

16 MR. BURGER: Your Honor, the Court of Appeals in
17 Williams v. Williams differs with that and states that when any
18 person maliciously institutes a judicial proceeding alleging
19 false and defamatory charges and then circulates a press
20 release or other communication based thereon cannot escape
21 liability by invoking the statutes. Williams v. Williams,
22 1969.

23 THE COURT: If one makes allegations in a complaint
24 that is not necessary to sustain a cause of action and is done
25 for the purpose of injuring another, Williams applies. But if

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1 the cause of action is stated and requires an allegation of
2 this nature and it is related to the cause of action, a person
3 is free to make it and the newspaper is free to report it and a
4 lawyer is free to comment as long as he or she confines the
5 comments to the record. Here the record is the allegation that
6 supports the statement.

7 MR. BURGER: The quotations in the counterclaim state
8 that the statements went beyond the allegations of the
9 complaint.

10 THE COURT: The statement here is expressly illegal
11 for any employer to take a worker's passport. That is in the
12 complaint. What is outside the complaint?

13 MR. BURGER: All of the allegations --

14 THE COURT: The next paragraph says she also alleged
15 that on one occasion Dayal told her she could only have the
16 additional money if she gave him a massage. That is in the
17 complaint.

18 MR. BURGER: And that was withdrawn.

19 THE COURT: Maybe it was withdrawn, but it doesn't
20 necessarily mean it is not in the cause of action.

21 MR. BURGER: So anyone can plead anything in an
22 original complaint so long as it is withdrawn and therefore
23 escape any liability even if it is absolutely false and
24 defamatory.

25 THE COURT: We will see what is false in the nature of

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1 the lawsuit. We have a lawsuit. It is not the basis of an
2 action for defamation. The counterclaim is stricken. The
3 motion is granted.

4 So we have this cause of action. It alleges very
5 serious matters. The case has been pending here for over a
6 year. There has been no discovery. How long is it going to
7 take you to finish your discovery?

8 MS. CACACE: Your Honor, we had originally, before
9 there was some of this motion practice, asked for four months
10 for discovery.

11 THE COURT: I am not going to give it to you. It is
12 too late. You have 60 days.

13 MS. CACACE: That is fine for us. We are happy to
14 move quickly.

15 THE COURT: Mr. Burger, can you do it in 60 days?

16 MR. BURGER: Yes.

17 THE COURT: There is no priority. Whoever wants to
18 depose another deposes another. I don't think we have any
19 documents to worry about in the case, so let's not get involved
20 with interrogatories and document demands. Go right to
21 depositions. Take whoever you need. There can't be very many
22 people, and get it ready.

23 MS. CACACE: I don't think there are very many
24 depositions, your Honor, and we don't need to hold up the
25 depositions for this, but we would also like to submit

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1 discovery requests.

2 THE COURT: What kind of discovery requests?

3 MS. CACACE: To see if there are any documents. The
4 defendants were required to keep records of Ms. Bhardwaj's
5 hours and pay and we would like to know if they exist.

6 THE COURT: That is legitimate. Why don't you write a
7 letter to Mr. Burger stating whatever you need, and it can't be
8 many more than five or six items, and Mr. Burger will supply
9 those.

10 What do you need of the plaintiffs, Mr. Burger?
11 Anything? Write a letter. Don't get stuck on Rule 34 requests
12 and go immediately to your depositions. This case has been
13 around. I will see you the second Friday in August.

14 All discovery must end completely by the end of July.
15 The second Friday is August 10, 10:00, status conference. We
16 will talk about what we need to try the case and I will set a
17 trial date very shortly after that.

18 MS. CACACE: Thank you, your Honor.

19 THE COURT: You are all finished, right, Mr. Abrams?

20 MR. ABRAMS: I just want to be clear that you have
21 stricken the counterclaims against all defendants.

22 THE COURT: Right. Your client is not in the case.
23 Very eloquent argument.

24 MR. ABRAMS: Thank you.

25 THE COURT: Thanks very much. (Adjourned)